SENTENCING UNDER THE PROPOSED OHIO CRIMINAL CODE

I. INTRODUCTION

An examination of the treatment that the sentencing decision has received in the past from those involved in the criminal justice system would lead to the conclusion that sentencing is relatively unimportant. For the most part, the continuous growth and modernization of criminal law in the area of the guilt determination process has not extended to the sentence determination process.[1] Recently, however, legal authorities have recognized that the sentence determination process is a very important and complex part of an effective criminal justice system.[2] The relationship of this process to the criminal law system as a whole has been pointed out by the *Task Force Reports: The Courts* statement that "[t]he imposition of sanctions on convicted offenders is a principal vehicle for accomplishing the goals of the criminal law."[3] This recognition of the peculiar function of the sentencing process has led to various recommendations on sentencing. These suggestions have taken the form of innovational techniques to be utilized in conjunction with present sentencing systems[4] and statutory models that could serve as guides in developing new effective sentencing procedures.[5]

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[1] *See Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 265 (1962) (remarks of Judge Sobeloff).

[2] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 1 (Tent. Draft, Dec. 1967) [hereinafter cited ABA STANDARDS]; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE COURTS 14 (1967) [hereinafter cited as TASK FORCE REPORT: THE COURTS]; MODEL PENAL CODE (Proposed Official Draft, 1962) [hereinafter cited as M.P.C. (P.O.D.)]; MODEL SENTENCING ACT (1963) [hereinafter cited as M.S.A.].

[3] TASK FORCE REPORT: THE COURTS, *supra* note 2, at 14. The importance of the sentencing process is magnified by the modern reliance on the guilty plea in the criminal justice system. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCING 1 (Tent. Draft, April 1967).

[4] Some states have adopted appellate review of criminal sentences in order to solve more pressing problems of the sentencing system. *See* ARIZ. REV. STAT. ANN. § 13-1717 (1956); CONN. GEN. STAT. ANN. § 51-194, 195, 196 (Supp. 1971); FLA. STAT. ANN. § 932.52 (supp. 1966); IOWA CODE ANN. § 793.18 (1950); ME. REV. STAT. ANN. tit. 5, §§ 2141-2144 (Supp. 1965); MD. ANN. CODE tit. 26 § 132-38 (Supp. 1971); MASS. GEN. LAWS ANN. ch. 278, § 28A-28D (1968); NEB. REV. STAT. § 29-2308 (1964); N.Y. CODE CRIM. PROC. § 450, 30 (Supp. 1971); ORE. REV. STAT. § 138.050 (1953). *See also* Bailey v. State, 238 Ark. 210, 381 S.W.2d 467 (1964); State v. Ledbetter, 83 Idaho 451, 364 P.2d 171 (1961); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959); State v. Johnson, 67 N.J. Super. 414, 170 A.2d 830 (1961); State v. Tuttle, 21 Wis. 2d 147, 124 N.W.2d 9 (1963). Sentencing institutes to study and formulate sentencing policies have been used to a limited extent in the federal court system to solve sentencing problems. *See* Tydings, *Ensuring Rational Sentences—The Case for Appellate Review*, 53 J. AM. JUD. SOC'Y 68, 72 (1969). This method does not appear to have had the desired effect as it has not been accepted on a wide basis. A third method to solve some of the sentencing problems which has been suggested and tried on a very limited basis is the use of a three judge council to decide the sentencing decision. *Id.* at 71.

[5] *E.g.*, M.P.C. (P.O.D.); M.S.A.

Although the sentence determination process receives the input of many participants in the criminal justice system, law enforcement officers, judges, and correctional officials, the lowest common denominator of responsibility in the process is the legislature. Legislative determinations are the most important to the success of an effective sentencing system because they define and guide the other participants in determining the consequences of a criminal act. For this reason the sentencing provisions of the Proposed Ohio Criminal Code[6] warrant close scrutiny to determine if the proposal accomplishes the goals of the criminal law by preventing individual harm and preserving the security of society through sanctions that promote deterrence (specific and general), incapacitation and rehabilitation. Unfortunately, an analysis of the Proposed Code and a comparison of its provisions with other sentencing formulations reveal that it does not promise to add to the prevention of harm and may even promote criminal behavior.

Under present Ohio law, except in capital cases or cases of mandatory life imprisonment, the sentencing tribunal usually has the choice of sentencing a criminal offender to probation (if the offense is probational) or to a fixed minimum and maximum terms of imprisonment that the judge cannot vary.[7] In comparison to a system with no minimums in which the judge within limitations sets the maximum term,[8] the present Ohio law allows the sentencing judge very little discretion in determining the length of incapacitation of an offender. In actuality the Adult Parole Authority in Ohio determines the length of time that an individual remains in prison. Generally, the present law has been criticized as too inflexible and the length of terms too long to facilitate anything but a retributive system.

The proposed Ohio sentencing provisions continue the Ohio tradition of extremely long sentences and in some cases exacerbate the situation by lengthening penalties. The major departure of the proposed code from the present law is in the idea of a variable minimum term. This flexibility in the minimum term would allow the judge to exercise a certain degree of discretion in determining the length of prison sanctions. However, unlike a sentencing system in which the judge's discretion only determines the maximum term and the offender is aware of exactly the length of imprisonment imposed upon him, the Proposed Code's formulation would leave uncertain the period of incarceration. This result could possibly have detrimental effects upon whatever rehabilitative functions prisons perform. In addition, since a presentence report is not required under the Proposed

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[6] Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedures, PROPOSED OHIO CRIMINAL CODE §§ 2929.01-.10 (1971) [hereinafter cited as PROP. OHIO CRIM. CODE]. The text of the proposed legislation is incorporated in HOUSE BILL NUMBER 511, 109th Ohio General Assembly (1971) [hereinafter cited as H.B. 511].

[7] *See, e.g.*, OHIO REV. CODE ANN. § 2901.06 (Page 1954).

[8] *See, e.g.*, 18 U.S.C. § 1464 (1970).

Code, the judge's discretion could be exercised without adequate information. This sentencing structure will undoubtedly result in not only long periods of incarceration but also in unequal treatment of similar offenders.

Perhaps, an optimum system of sentencing would provide for an indeterminate sentence with a well-staffed and well-funded correctional system determining when the offender is prepared to return to society. However, such a system is not a practical alternative in Ohio at this time and may never be until a coherent theory of rehabilitation is formulated. In the interim, though, extremely long periods of incarceration do not appear to be an answer for at least two reasons. First, the condition of Ohio's correctional facilities today hardens a large number of offenders to the ways of crime. Second, available data on deterrence shows that increased sanction does not produce the expected extra deterrence and thus, does not add to the security of society.[9] Therefore, the sentencing provisions of the Proposed Code do not seem to further a primary purpose of the criminal law.

This comment will attempt to explore the parameters and origins of this basic difficulty in the Proposed Code. In addition, other problem areas raised by the classification and sentencing provisions will be analyzed and contrasted with two model proposals to determine if alternative formulations would serve the purposes of the criminal law more efficiently. Finally, this comment will discuss the role of the presentence report in proposed sentencing system that allows the sentencing authority a great deal of discretion in determining how long an offender will remain incarcerated.

II. CLASSIFICATION OF OFFENSES

In most states, like Ohio, the criminal law is represented by an amorphous patchwork of statutes unrelated to each other or to any unifying idea.[10] The recognition of this statutory disorganization and the desire to obtain a lasting solution to this problem has caused most authorities interested in criminal law reform to request a systematic classification of offenses.[11] The generally suggested type of classification is that all crimes should be put into categories which reflect substantial differences in gravity.[12] Categorizing offenses into relatively few groups according to the

[9] F. ZIMRING, PERSPECTIVE ON DETERRENCE 89 (1971).

[10] Hall, *Revision of Criminal Law—Objectives and Methods*, 33 NEB. L. REV. 383, 384-85 (1954).

[11] M.P.C. (P.O.D.); M.S.A.; ABA STANDARDS, *supra* note 2; TASK FORCE REPORT: THE COURTS, *supra* note 2. *See* Alexander, *A Hopeful View of the Sentencing Process*, 3 AM. CRIM. L.Q. 189 (1965); Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465 (1961); Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469 (1964); Note, *Criminal Sentence Revision—A Necessity*, 49 IOWA L. REV. 499 (1964).

[12] ABA STANDARDS, *supra* note 2, at 48. The theories upon which the MODEL PENAL CODE and the MODEL SENTENCING ACT sentencing provisions are based allow for consideration of the criminal act and the personality make-up of the offender. There is, however, a basic distinction in the weight given to these two factors by each recommendation which

seriousness of the conduct greatly improves the condition of criminal codes. First, classification requires a thorough examination of all offenses and the penalties associated with them. But classification does more than force an examination of the individual offenses and penalties because, in order to place a certain crime into a category, a comparison between offenses must be made. This comparison would of necessity include analyses in terms of similarities, differences, and interrelationships and is the best method for assuring consistency in a criminal code. Because this type of classification is based on the seriousness of the offense, it would be tied very closely to the penalty structure of the code. Thus, classification will result in the creation of a rational sentencing structure and hopefully will eliminate many of the inequities in the present Ohio law. A comprehensive and well thought out classification system, moreover, would do more than put logic and consistency into the present criminal code. It would act also as a guide to future amendments; before any new crime would be put into a category, the legislature would be required to relate it to existing crimes. This comparison would help to prevent some typical evils of piecemeal legislation that are present in existing criminal codes.

Following the lead of most other states which have recently revised their criminal codes,[13] the Proposed Ohio Criminal Code authorizes the classification of all criminal offenses into categories.[14] Eleven categories are established by the proposed revision,[15] and each one represents a different degree of seriousness which is reflected by the sanction authorized for each category.[16] Although categorization is typical of all the current revisions, there is one difference between the classification system reflected in the Proposed Ohio Criminal Code and the systems suggested by other states' formulations and the Model Penal Code. This difference is the number of categories created. Ohio will have 11 categories[17] even though the

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must be kept in mind when analyzing each proposal. The MODEL PENAL CODE places much more emphasis on the criminal act than does the MODEL SENTENCING ACT. The MODEL SENTENCING ACT, on the other hand, stresses the dangerousness of the offender, discounting almost entirely the offense committed.

[13] *E.g.*, N.Y. PENAL LAW § 55.05 (McKinney 1967); N.M. STAT. ANN. § 40A-1-5,-6 (1953).

[14] PROP. OHIO CRIM. CODE § 2901.02.

[15] PROP. OHIO CRIM. CODE § 2901.02(A) provides:

> Offenses include capital murder, murder, felonies of the first, second, third, and fourth degree, misdemeanors of the first, second, third, and fourth degree, minor misdemeanors, and offenses not specifically classified.

[16] PROP. OHIO CRIM. CODE § 2901.02, Committee Comments at 22 provides:

> Proposed section 2901.02 is aimed, first, at providing a classification system for offenses which lends itself to greater flexibility in penalizing criminal conduct according to its relative gravity . . . .

The sanctions authorized for each category of offenses are contained in PROP. OHIO CRIM. CODE §§ 2929.01, 2929.04 and 2929.06 and are reflected in Appendix II.

[17] PROP. OHIO CRIM. CODE § 2901.02. For the Technical Committee's theory for establishing eleven categories of offenses, *see* PROP. OHIO CRIM. CODE § 2901.02, Committee Comments at 23 (to provide for great flexibility in characterizing offenses).

American Bar Association suggests that "categories should be very few in number"[18] and the Model Penal Code suggests that only six or possibly seven classifications are adequate.[19] The theory supporting relatively few classes is that a small number of sentencing categories will provide the judiciary with the sanctions necessary to deal with the different offenses. These relatively few classes of sanctions can easily be multiplied by the court into many more sentencing alternatives, but these alternatives will not be based on the crime committed but rather on the individual and circumstances of the crime.[20] It is submitted that this formulation of few classes would provide the court with ample alternatives to dispose of offenders without creating the opportunity for unnecessary and senseless distinctions to reappear in the criminal codes.[21]

Although the adoption of a classification system is part of the answer to the overall sentencing problem, it surely is not the whole answer. The classification system will not improve sentencing in terms of achieving the goals of the criminal law unless the formulation of the new system eliminates the substantive problems inherent in existing sentencing practices. Decisions concerning the form of a classification system, however, will substantially affect the success of the new system.

III. Disposition of Offenders

A. *Imprisonment*

Traditionally, the sanctions used to accomplish the goals of the criminal justice system were fines, probation, and imprisonment. Of the three tools of punishment, institutionalized confinement of criminals was thought to be the most effective sanction to achieve the goals of the criminal law. The theory justifying this assumption was that

> [b]ecause of its severity as compared with fine or probation, imprisonment is believed to have a greater deterrent effect on potential offenders and on the prisoner himself. It isolates from society persons who are likely to commit further criminal acts, and it may provide a type of discipline and training in an institutional setting that would be helpful in beginning certain programs of rehabilitation.[22]

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[18] ABA STANDARDS, *supra* note 2, at 48 (§ 2.1(a)).

[19] M.P.C. §§ 1.04, 6.01 (P.O.D.). The New York revision has adopted eight categories (N.Y. PENAL LAW § 55.05 (McKinney 1967)), and New Mexico seven. (N.M. STAT. ANN. § 40A-1-5,-6 (1953)).

[20] M.P.C. § 6.12 (P.O.D.) provides:

> If, when a person has been convicted of a felony, the Court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the view that it would be unduly harsh to sentence the offender in accordance with the Code, the Court may enter judgment of conviction for a lesser degree of felony or for a misdemeanor and impose sentence accordingly.

[21] M.P.C. § 6.01, Comment at 10-11 (Tent. Draft No. 2). *See also* ABA STANDARDS, *supra* note 2, at 51-54.

[22] TASK FORCE REPORT: THE COURTS, *supra* note 2, at 15.

Because of this concept, imprisonment was and is still used extensively to achieve the goals of the criminal law. However, recent analysis of various methods used to achieve correctional goals has uncovered a growing disenchantment with imprisonment. Reintegrating into society rather than isolating of the offender has been recognized as a more efficient use of present correctional facilities.[23] Thus, many recommendations have suggested change to the general preference for institutionalization.[24]

1. Excessive Lengths of Sentences

All authorities agree that imprisonment is needed in certain cases. But they agree also that the sentences imposed by American courts are generally much too long.[25] Excessive sentences (that is, sentences longer than necessary to protect society) harm not only the individual offender but also society. The associations made by the offender while imprisoned reinforce the offender's criminal tendencies and impede his reintegration into society.[26] Additionally, the economic cost of imprisonment is high in comparison to alternative forms of sanctions.[27] Assuming a steady stream of offenders into the present correctional system, excessive sentences would cause prison populations to be multiplied.[28] This increased cost would represent the additional employees and facilities needed to maintain a burgeoning correctional system. A higher cost would be justifiable if society were benefited in proportion, but available data on deterence indicates that increased and excessive penalties have little impact as an additional protection to society.[29] Thus, the problem facing any legislature interested in the reform of the sentencing system is how to prevent excessive sentencing and still provide for long-term commitment when needed. The American Bar Association's Report rephrases this problem in terms of desired goals. It states:

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[23] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: CORRECTIONS 29 (1967).

[24] *E.g.*, George, *An Unsolved Problem: Comparative Sentencing Techniques*, 45 A.B.A.J. 250 (1959); Murrah & Rubin, *Penal Reform and the Model Sentencing Act*, 65 COLUM. L. REV. 1167 (1965); Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528 (1958).

[25] M.P.C. § 6.07, Comment at 24-26 (Tent. Draft No. 2); M.S.A. § 9, Comment at 22-29; ABA STANDARDS, *supra* note 2, at 56-59; TASK FORCE REPORT: THE COURTS, *supra* note 2, at 17. *See also* Mannheim, *Comparative Sentencing Practice*, 23 LAW & CONTEMP. PROB. 557 (1958); Murrah & Rubin, *Penal Reform and the Model Sentencing Act*, 65 COLUM. L. REV. 1167 (1965); Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528, 540-41 (1958); Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960).

[26] TASK FORCE REPORT: THE COURTS, *supra* note 2, at 15.

[27] *Id.*

[28] Prison population, like the world population, would increase in a geometric progression if prisoners were incarcerated for a longer period of time while the influx of new inmates remained the same or increased.

[29] F. ZIMRING, PERSPECTIVES ON DETERRENCE 89 (1971).

> Excessive sentences do a serious disservice to the community which is supposed to be protected by them, not to mention their impact on the individual . . . . [T]he Advisory Committee would accept and indeed encourage long sentences in cases where public protection would convincingly appear to be served. But in cases where protection of the public would not to be served—and an Advisory Committee believes this to be close to ninety per cent of those who are now committed to penal institutions—the Committee does not believe that a long sentence is reasonably justified.[30]

Although agreement on the existence of the problem is easy to find, agreement on a workable solution is difficult to discover. Two seemingly contrary positions have been advocated by noted legal associations.[31] On the one hand, the Model Penal Code's answer to the problem is to provide for an indeterminate sentencing system for felonies with a possible low minimum and rather high maximum sentence.[32] For misdemeanors the Model Penal Code provides for definite sentences under the traditional one year limitation.[33] Provision is made to extend the authorized imprisonment in certain circumstances.[34] The Code also authorizes fines which may be imposed in conjunction with sentences of imprisonment for both felonies and misdemeanors. The Model Penal Code established its maximum terms on the assumption that they are the highest limits which can be justified for the type of offense and offender involved.[35] This determination involves two steps. The first is to establish sentencing alternatives which would be available whenever a certain type of crime is committed. The alternatives provided are to depend solely on the seriousness of the type of offense involved. The second step is to provide for an additional sentence term, the "extended term."[36] The sanction system authorized by the Model Penal Code is expressed by the chart in Appendix I which shows the possible minimum and maximum sanctions authorized for both the ordinary and extended terms.[37]

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[30] ABA STANDARDS, *supra* note 2, at 59.

[31] The American Legal Institute's position is represented by the Model Penal Code, while the National Council on Crime and Delinquency has sponsored the Model Sentencing Act.

[32] M.P.C. § 6.06 (P.O.D.).

[33] M.P.C. § 6.03 (P.O.D.).

[34] The extended terms authorized for felonies are set out in M.P.C. § 6.07 (P.O.D.) while those for misdemeanors are in M.P.C. § 6.09 (P.O.D.). The criteria established for using the extended term sentence is set out in M.P.C. §§ 7.03, 7.04 (P.O.D.).

[35] M.P.C. §§ 1.05, 6.07, Comment at 7-9, 24-26 (Tent. Draft No. 2).

[36] M.P.C. §§ 7.03, 7.04 (P.O.D.). *See* M.P.C. § 7.03 Comment at 41 (Tent. Draft No. 2):

> The court may impose sentence for an extended term only if it finds that the defendant is a persistent offender, a professional criminal or a dangerous mentally abnormal person, whose commitment for an extended term is necessary for protection of the public or that he is a multiple offender whose criminality was so extensive than [*sic*] an extended term is warranted.

[37] The classes of offenses are set out in M.P.C. §§ 1.04 and 6.01 (P.O.D.). The ordinary term authorized for each class is in M.P.C. §§ 6.06 and 6.08 (P.O.D.) while the fines autho-

In contrast to the Model Penal Code is the approach of the Model Sentencing Act. Both model proposals seem to take account of the same factors. However, different emphasis is given to those factors which often produce a different result. The approach taken by the Model Sentencing Act is that

> [a]ttention [is]first focused on the proper disposition of the dangerous offender, for it is in this area that existing sentencing laws are most glaringly ineffective . . . .
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> The only other statutory pattern designed to deal with the dangerous offender is sentencing by offense—the main approach adopted by all penal laws. Yet, the offense alone is not a suitable guide; as is only too well known, even murder and rape may be committed by those who will never commit another crime. Thus, it is readily acknowledged that the personality of the particular offender must also be taken into account. However, to sentence on the basis of personality alone would do violence to due process of law. Accordingly, the Council of Judges sought to insure that the determination of dangerousness would be based both on (a) the criminal act, and (b) the personality make-up of the offender. Sections 5 and 6 of the Model Sentencing Act give statutory form to this view . . . .[38]

Several basic distinctions between the Model Sentencing Act and the Model Penal Code should be noted. First, the Model Penal Code is an entire criminal code. The Model Sentencing Act deals only with the sentence related portions of a criminal code and does not define what conduct should be criminal. Second, the recommendations in the Model Penal Code dealing with sentencing are aimed at both felonies and misdemeanors, while the Model Sentencing Act is more or less limited to felonies.[39] Finally, the Model Penal Code calls for a classification of crimes not only into felonies and misdemeanors but into specific degrees of each.[40] The Model Sentencing Act presupposes the existence of a felony-misdemeanor classification of offenses.[41]

With these distinctions in mind an examination of the provisions of the Model Sentencing Act shows that, although the Committed offense is of some importance, the character of the offender is the most important factor in the proposed sentence determination process. Thus, there are two fundamental classes established by the Model Sentencing Act. Sections 5 and 6 of the Act deal with the class of "Dangerous Offenders" and, except when the crime is murder in the fist degree,[42] authorize the court to

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rized are in M.P.C. § 6.03 (P.O.D.) The extended terms authorized are in M.P.C. §§ 6.07 and 6.09 (P.O.D.).

[38] Murrah and Rubin, *Penal Reform and the Model Sentencing Act*, 65 COLUM. L. REV. 1167, 1170-71 (1965).

[39] M.P.C. §§ 1.04, 6.01, 6.03, 6.06 ,6.07, 6.08, 6.09, 7.03, 7.04 (P.O.D.); M.S.A. §§ 5-13.

[40] M.P.C. § 1.04 (P.O.D.).

[41] M.S.A. § 9, Comment at 29.

[42] M.S.A. § 7 provides that "[a] defendant convicted of murder in the first degree shall be committed for a term of life."

sentence any felony offender which it finds "dangerous" to 30 years imprisonment.[43] If the convicted offender is not found to be "dangerous" within the meaning of the statute, he is termed an "ordinary offender" and is sentenced according to § 9 of the Act.[44] This section authorizes the court to set a maximum sentence of up to five years imprisonment and/or a fine of up to $10,000.[45] The use of a five year sentence limitation in the vast majority of the cases is to avoid the excessive sentencing which plagues American criminal law.[46]

Emphasis on the offender rather than on the offense for purposes of sentencing may not be as great as it seems because the Model Sentencing Act hedges its theory of sentencing in two ways. First, the offender convicted of first degree murder is treated somewhat differently because a sen-

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[43] M.S.A. § 5, defining and dealing with the disposition of dangerous offenders, provides:

> Except for the crime of murder in the first degree, the court may sentence a defendant convicted of a felony to a term of commitment of thirty years, or to a lesser term, if it finds that because of the dangerousness of the defendant, such period of confined correctional treatment or custody is required for the protection of the public, and if it further finds, as provided in section 6, that one or more of the following grounds exist:
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> (a) The defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, has been previously convicted of one or more felonies not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons.
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> The findings required in this section shall be incorporated in the record.

Before the court can sentence according to this section, however, it must find certain requirements set out in M.S.A. § 6 which provides:

> The defendant shall not be sentenced under subdivision (a) or (b) of section 5 unless he is remanded by the judge before sentence to [diagnostic facility] for study and report as to whether he is suffering from a severe personality disorder indicating a propensity toward criminal activity; and the judge, after considering the presentence investigation, the report of the diagnostic facility, and the evidence in the case or on the hearing on the sentence, finds that the defendant comes within the purview of subdivision (a) or (b) of section 5. The defendant shall be remanded to a diagnostic facility whenever, in the opinion of the court, there is reason to believe he falls within the category of subdivision (a) or (b) of section 5. Such remand shall not exceed ninety days, subject to additional extensions not exceeding ninety days on order of the court.
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> The defendant shall not be sentenced under subdivision (c) of section 5 unless the judge finds, on the basis of the presentence investigation or the evidence in the case or on the hearing on the sentence, that the defendant comes within the purview of the subdivision. In support of such findings it may be shown that the defendant has had in his own name or under his control substantial income or resources not explained to the satisfaction of the court as derived from lawful activities or interests.

(Citation omitted).

[44] M.S.A. § 9.

[45] *Id.*

[46] M.S.A. § 9, Comment at 22-29.

tence of life imprisonment is authorized.[47] Second, optional § 8 dealing with atrocious crimes, provides for a maximum sentence of ten years rather than five years when certain offenses are involved, even though the convicted criminal is not within the class of "dangerous offenders."[48] The crimes which are viewed by some members of the Advisory Council of Judges as serious enough to differentiate them from most felonies are: (1) second degree murder; (2) arson; (3) forcible rape; (4) robbery while armed with a deadly weapon; (5) mayhem; and (6) bombing of an airplane, vehicle, vessel, building or other structure.[49] However, the comment to optional § 8 reveals that this departure from the theory of the Model Sentencing Act was seriously questioned by several members of the Advisory Council.[50]

Although the character of the specific crime has some relation to the sanction authorized by the Model Sentencing Act, the emphasis placed on that factor is less than the weight given it by the Model Penal Code. Both sets of recommendations are aimed at the same problem: the elimination of excessive sentences and provision for long term commitment when necessary. The answers that they give are considerably dissimilar due to the different emphasis on the criminal act and the character of the offender in determining the appropriate sentence needed to achieve the goals of criminal law. Which approach is the more effective is somewhat a matter of opinion. However, following an examination of the proposal before the Ohio Legislature, this comment will suggest a compromise alternative.

Ohio's Proposed Criminal Code has followed, for the most part, the Model Penal Code's suggestion that a classification system is needed and that the statutory framework of such a system be "premised on the view that the length and nature of the sentences of imprisonment authorized by the Code must rest in part on the seriousness of the crime and not, as has been argued, solely on the character of the offender.[51] The Proposed Ohio Criminal Code would establish 11 classes of offenses.[52] The gravity of each class would be reflected in the sanctions authorized for each.[53] The distinctions between the classes are illustrated by the chart set out in Appendix II, which shows the possible minimum and maximum sanctions

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[47] M.S.A. § 7, Comment at 21.

[48] M.S.A. § 8.

[49] *Id.*

[50] M.S.A. § 8, Comment at 21-22.

[51] M.P.C. § 6.01, Comment at 10. (Tent. Draft No. 2).

[52] *See* references cited *supra* note 17.

[53] *See, e.g.*, PROP. OHIO CRIM. CODE § 2929.01 (sentences for capital murder and murder); PROP. OHIO CRIM. CODE § 2929.04 (sentences for felonies of the first, second, third, and fourth degree); PROP. OHIO CRIM. CODE § 2929.06 (sentences for first, second, third and fourth and minor misdemeanors).

for each category. After such a framework is established, individual offenses are categorized according to seriousness into one of the classes.[54]

A comparison of the sanctions authorized by the Proposed Ohio Criminal Code with the sanctions authorized presently under the existing code will show little change in the maximum sentence authorized for each offense.[55] The proposed provisions establishing minimum sentences do, on the other hand, reflect a change from existing authorized minimum sanctions[56] and very well could increase the problem of excessive sentences. Under existing Ohio minimum sentence limitations, the minimum established is one or sometimes two years.[57] Thus for most offenses, the prisoner may be set free on parole after a certain portion of that minimum term is served if the Adult Parole Authority determines that release would be beneficial.[58] Under the new proposals, however, the minimum terms are set much higher and consequently the prisoner will not be released as early as he can be under the present Ohio law. The advisability of the establishment of a minimum term at all or giving the judge a choice of minimum terms will be discussed below. However, it is important to note that the authorization of the specific number of years that the Ohio proposals establish will, of necessity, force continued incarceration of some offenders who could now be discharged relatively early—regard-

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[54] *See* PROP. OHIO CRIM. CODE at ix.

[55] The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 50-B-1 (Nov. 21, 1969).

[56] *Id.*

[57] *Id.*

[58] *See* OHIO REV. CODE ANN. § 2967.19 (Page Supp. 1971):

> A person confined in a state penal institution and not eligible to parole before the expiration of a minimum sentence or term of imprisonment or sentenced thereto under a general sentence, who has faithfully observed the rules of said institution, is entitled to the following diminution of his minimum sentence:
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> (A) A prisoner sentenced for a minimum term of one year shall be allowed a deduction of five days from each of the twelve months of his minimum sentence.
>
> (B) A prisoner sentenced for a minimum term of two years shall be allowed a deduction of six days from each of the twenty-four months of his minimum sentence.
>
> (C) A prisoner sentenced for a minimum term of three years shall be allowed a deduction of eight days from each of the thirty-six months of his minimum sentence.
>
> (D) A prisoner sentenced for a minimum term of four years shall be allowed a deduction of nine days for each of the forty-eight months of his minimum sentence.
>
> (E) A prisoner sentenced for a minimum term of five years shall be allowed a deduction of ten days from each of the sixty months of his minimum sentence.
>
> (F) A prisoner sentenced for a minimum term of six or more years shall be allowed a deduction of eleven days for each of the months of his minimum sentence.
>
> (G) A prisoner sentenced for a minimum of a number of months or fraction of years shall be allowed the same time per month as is provided for the year next higher than such minimum sentence.
>
> A prisoner is eligible for parole only after the expiration of his minimum sentence, diminished as provided by this section.

PROP. OHIO CRIM. CODE § 2967.19 is substantially the same as the above existing provision.

less of how effective a deterrent the longer periods will provide. For example, arson is punishable by a minimum of two years imprisonment under existing Ohio law.[59] At the earliest, an offender convicted of arson would be eligible for parole in slightly more than one year and 7 months. Under the Proposed Criminal Code arson is a first degree felony punishable by a minimum sentence of from five to ten years.[60] If the minimum sentence set by the judge were five, six, seven, eight, nine or ten years, the time the offender would have to serve before becoming eligible for parole would be three years and four months, four years and one month, four years and five months, five years and one month, five years and nine months, six years and two months, respectively. Thus, the proposed provisions will increase excessive and unnecessary imprisonment over existing Ohio law.

The Model Penal Code provisions establishing minimum sanctions also create the possibility of unneeded time in prison, but not to the degree that the Ohio proposals do. The minimum sentences established by the Model Penal Code are similar to those now existing in Ohio, but the Ohio proposals are substantially higher than the existing minimums. For example, the minimums allowable under the Model Penal Code are: for first degree felony, one, two, three, four, five, six, seven, eight, nine or ten years and for second degree felony one or two years.[61] Thus, if a judge were to set the same sentence as today (which he could do under the Ohio proposals), the problem of excessive sentences would not be exacerbated. Even under the Model Penal Code, there is some risk that unnecessary time will be spent in prison sanctions.

Whether or not relatively long *maximum* terms are beneficial has been the subject of much controversy for many years. Most commentators agree that the length of sentences authorized by criminal codes in America are much higher than needed.[62] The Model Penal Code states that the maximum for felonies, "at least for most offenses, need not be and should not be inordinately high."[63] The President's Commission on Law Enforcement and Administration of Justice has found that "a common characteristic of American penal codes is the severity of sentences available for almost all felony offenses."[64] Although the Proposed Code recognizes that a long term of imprisonment is not needed in most cases and that establishment of severe sentences involves some risks,[65] it authorizes what would

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[59] OHIO REV. CODE ANN. § 2907.02 (Page 1954).

[60] PROP. OHIO CRIM. CODE § 2909.02.

[61] M.P.C. § 6.06 (P.O.D.).

[62] *See* references cited *supra* note 24.

[63] M.P.C. § 6.06, Comment at 24-26 (Tent. Draft No. 2).

[64] TASK FORCE REPORT: THE COURTS, *supra* note 2, at 16-17.

[65] PROP. OHIO CRIM. CODE §§ 2929.04-05, Committee Comments at 285.

be termed by most commentators severe sentence maximums.[66] However, the Technical Committee justifies such severity on the ground that some offenses and offenders require a longer period of incapacitation to protect society.[67]

Even though specific criminal conduct is very important in the statutory makeup of the proposed system it is apparent that the proposals acknowledge to some extent the importance of differences between individuals in the sentence determination process. Although under the Proposed Ohio Criminal Code the relative emphasis placed on these two factors is much more similar to the Model Penal Code than to the Model Sentencing Act, the Ohio proposals would vary the suggested method of integrating these two considerations into the sentence determination process. The Ohio proposals, rather than establishing two sets of minimum and maximum terms as the Model Penal Code does,[68] would establish only one set of limitations applicable in every case and would suggest that the longer terms be given to the more recalcitrant offenders.[69] Thus, if an offender comes within the definitions of a "repeat offender"[70] or a "dangerous offender,"[71] he is more likely to receive a longer prison term than an "ordinary offender." The Ohio proposals would also provide that "determining the minimum and maximum terms of imprisonment to be imposed for felony, the court shall consider . . . the history, character and condition of the offender and his need for correctional or rehabilitative treatment."[72] In these ways, the Ohio proposals call for a consideration of individual characteristics when imposing sentence on the offender. Thus, it was hoped that the Ohio proposals would solve the problem of excessive sentences and still would enable the court to protect society against the dangerous offender.

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[66] *E.g.*, M.S.A. §§ 5, 9 Comment at 17-20, 22-29; ABA STANDARDS, *supra* note 2, at 56-61.

[67] PROP. OHIO CRIM. CODE § 2929.04-.05, Committee Comments at 285-86.

[68] The present Ohio statutes do provide for special treatment of habitual and psychopathic offenders. *See* OHIO REV. CODE ANN. §§ 2947.24-.28, 2961.11-.13 (Page 1954).

[69] "If the offender is a repeat or dangerous offender, it shall be considered in favor of imposing longer terms of imprisonment for felony." PROP. OHIO CRIM. CODE § 2929.05(B). "If the offender is a repeat or dangerous offender . . . . it shall be considered in favor of imposing imprisonment for misdemeanor." PROP. OHIO CRIM. CODE § 2929.07(B).

[70] PROP. OHIO CRIM. CODE § 2929.05(E)(1) defines a repeat offender as:

> One who has a history of persistent criminal activity, and whose character and condition reveal a substantial risk that he will commit another offense. It is prima-facie evidence that an offender is a repeat offender if he has been convicted of an offense of similar gravamen to the present offense, or of two or more offenses of any type or degree other than traffic offenses or minor misdemeanors, committed at different times after reaching age eighteen, and if he has been imprisoned pursuant to sentence for any such offense.

[71] PROP. OHIO CRIM. CODE § 2929.05(E)(2) defines "dangerous offender" as one whose history, character, and condition reveal a substantial risk that he will be a danger to others, and whose conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to consequences. "Dangerous offender" includes, without limitation, psychopathic offender as defined in section 2947.24 of the Revised Code.

[72] PROP. OHIO CRIM. CODE § 2929.05(A).

It is submitted, though, that the approach adopted by the Ohio proposals offers no hope for the elimination of excessive sentences. Even if the proposals were changed to correspond more closely to the Model Penal Code, there appears to be little chance of any substantial change in sentencing patterns. The emphasis that these proposals place on the offense plus the high minimum sentences required and maximum sentences authorized will continue the pattern of sentencing offenders to long terms of imprisonment, even though it is recognized that in the majority of cases a long term is far from beneficial.[73] A reemphasis of the factors which are used to determine sentence is surely needed if the desired goals are to be achieved. The Model Sentencing Act offers this reemphasis by structuring the sentence determination system so that the individual rather than the crime is the critical factor. Stressing the individual rather than the crime is a radical departure from past practices and will probably not be considered by the Ohio legislature even though such a reemphasis could relieve some of the sentencing problems.

If the Ohio legislature is truely interested in improving the sentencing system but hesitant to adopt the more basic changes proposed in the Model Sentencing Act, perhaps a compromise between the Model Penal Code and the Model Sentencing Act can be found. Such a compromise would emphasize the ordinary offender in the criminal justice system and would leave the recidivist or miscreant to the severity of special provisions.[74] Structuring the sentence determination system to the typical offender should result in fewer excessive sentences while at the same time protecting the public in those exceptional cases where long-term commitment is needed. Instead of the indiscriminately long minimum and maximum sentences that are contained in the Ohio proposals, a low minimum and maximum should be authorized to take care of the ordinary offender with provision for extending these limits when dealing with a particularly dangerous offender. Moreover, emphasis can be given even to the criminal act and the individual offender's characteristics by classifying offenses into a small number of categories with sentence limitations tied to the usual rather than to the unusual offender. Special provisions can then be applied to the highly dangerous offenders who threaten society's safety. Integrating the concepts and portions of the provisions of the Model Penal Code and those of the

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[73] M.S.A. § 9, Comment at 22-29. The impact of increased minimum sentences mandated by the Proposed Ohio Criminal Code does not stop with the individual offender but will have a large dollar and cents impact on the taxpayers of Ohio. Statistics recently compiled by Mrs. Ysabel Rennie of the Citizens Task Force on Corrections indicate the great financial burden necessary to keep prisoners in jail for one year longer. It now costs $3,000 a year to feed, clothe and guard a prisoner. This means that for one year added to present sentences the taxpayers will be required to pay $27,778,604.00 more in taxes. An increase of two years in average sentences will add $55,557,208.00. This figure is indeed a conservative estimate of increased costs as it assumes present prison populations and no increase in prices, both of which are constantly rising.

[74] ABA STANDARDS, *supra* note 2, at 60.

Model Sentencing Act should result in a legislative model which could eliminate some of the sentencing problems and still guarantee a large degree of safety for society.

2. Minimum and Maximum Sentence Limitations

The importance of the minimum and maximum terms of imprisonment was mentioned in the discussion above on the excessive length of authorized sentences. At that point, however, those limitations were discussed only in relation to their effect on the length of sentences generally imposed on offenders. These limitations have another important effect on the determination of what sentence any offender will serve. Proposals dealing with the establishment and structure for imposing the minimum and maximum sentence are in effect distributions of power by the legislature to the courts and correctional agencies. Under an indeterminate sentencing structure, it is the courts and correctional agencies which deal with the individual offender and determine what portion of the authorized sentence will be served. Because parole is generally unavailable until a certain portion of an imposed sentence is served,[75] any discretion given the courts to determine sentence limitations (either minimum or maximum) will effect correctional board power to release or hold a prisoner.

The Model Sentencing Act stresses the role of the correctional board in the disposition of offenders. Because parole boards operate only within the range left after legislative and judicially imposed restrictions, the Model Sentencing Act does not authorize a minimum term of imprisonment. Thus, a parole board could release a defendant at any time before the maximum period is served.[76] This lack of minimum sentence is based, as is the Model Sentencing Act as a whole, on the premise that there is no need to keep an offender in prison if society is not threatened by his release.

The Model Penal Code, however, takes the position that authority should be distributed between the court and the correctional officials in an attempt to give each the type of power and responsibility that they are best equipped to exercise.[77] Under this theory, the Model Penal Code suggests that the court should be able to pick a minimum sentence within a certain statutory range.[78] The discretion granted the trial judge, though, is not substantial, except in the case of first degree felonies where the choice is from one to ten years and one to two years respectively.[79] When a court determines that an extended term is in order, however, its discretion is increased, especially in the case of a first degree felony where the minimum

[75] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 60-71 (1967).

[76] M.S.A. § 1, Comment at 1-3.

[77] M.P.C. §§ 6.06, 6.07, Comment at 24-25 (Tent. Draft No. 2).

[78] M.P.C. § 6.07 (P.O.D.).

[79] *Id.* § 6.06.

term can be set at one to thirty years.[80] The Model Penal Code's commitment to judicial discretion in setting the minimum sentence does not appear pervasive since it is limited to first degree felonies. However, the Code is firmly committed to the requirement of a minimum sentence of one year in all felony cases where imprisonment is imposed.[81]

Neither the Model Penal Code nor the Model Sentencing Act state their reasons for adopting these positions in any great detail.[82] Commentators have attempted to fill in the missing reasons by asserting rather vague arguments in support of one position or another.[83] Generally, the reasons advanced gloss over the real controversies underlying these positions. The real dispute appears to involve the power to determine when a prisoner can be released. The court has the power to determine if a defendant is granted probation or goes to prison.[84] However, the judiciary may or may not have the power to determine how long an offender will stay in prison. The Model Penal Code asserts that it is beneficial to have the court contribute to this determination. The Model Sentencing Act vests this power solely in the parole board.[85]

Although in theory it would seem better to eliminate the minimum term entirely so that an offender could be released when rehabilitated or no longer a danger to society, there are practical considerations which may require the adoption of a minimum sentence limitation. A minimum term can be used to reassure the community that the criminal law system is functioning as a deterrent and punishment for crime by imprisoning offenders for at least a minimum period. Since many appear to believe in retribution as one goal of the criminal law, the establishment of low minimum sentences may provide political satisfactions and thus, may protect the criminal law system from legislative overreaction. Although most criminal law and corrections "experts" assert that mandatory sentences (provisions requiring imprisonment for every violation) are unjust and useless, a number of crimes carry such provisions.[86] A major cause of such provisions is legislative overreaction to situations where treatment of offenders was

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[80] *Id.* § 6.07.

[81] *Id.* § 6.06. *See* M.P.C. § 6.06, Comment at 24-26 (Tent. Draft No. 2).

[82] M.P.C. § 6.06, Comment at 24-26 (Tent. Draft No. 2) states that "[a] minimum of one year on prison sentences for felony appears, in any case, to be an institutional necessity." The M.S.A. § 1, Comment at 13 states:

> The sentencing system should not impose restrictions—for example, a minimum term—on a parole board. A minimum term prevents a parole board from releasing a defendant who in its judgment is suitable for release before the expiration of the minimum terms of eligibility. This Act does not authorize a minimum term.

[83] For a summary of these arguments and their sources, see ABA STANDARDS, *supra* note 2, at 147.

[84] M.P.C. § 6.02 (P.O.D.); M.S.A. § 9.

[85] M.S.A. § 1, Comment at 1-3.

[86] ABA STANDARDS, *supra* note 2, at 54, 145-50; TASK FORCE REPORT: THE COURTS, *supra* note 2, at 17. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 186 (1967).

considered too lenient. A provision authorizing courts to establish minimum sentences can produce public and legislative reassurance if the courts can authorize higher minimum sentences when grave offenses are involved. Errors resulting from use of this provision can be prevented by authorizing correctional authorities to reexamine such decisions and to recommend sentence changes. The Model Penal Code contains a provision which can be used to correct such mistakes in initial sentencing.[87]

Unlike the propriety of minimum sentence limitation, the establishment of a maximum sentence limitation does not seem to be questioned because it is considered a necessity in a system of criminal sanctions.[88] There also appears to be no controversy over legislative establishment of a maximum term for a specific category of offenses. There is controversy, however, on whether or not the maximum sentence authorized by the legislature must be imposed if the court can impose a lesser maximum sentence on a given offender. The Model Sentencing Act favors granting this discretion to the court.[89] It reasons that "[t]his discretion is provided for in the case of long-term commitments to give scope to individualized consideration of the defendant."[90] Although individualized consideration of sentences in relation to the maximum time served could be achieved through parole boards, there is some feeling that these boards have not followed individualization.[91] To guard against the resulting excessive sentences, a judicially controlled maximum sentence has been suggested.[92] In contrast to the Model Sentencing Act, the Model Penal Code adopts the view that the maximum should be fixed by statute in the ordinary case, which permits the correctional authorities to individualize the sentence.[93] This position is somewhat qualified by several factors. First, support for this position by the drafters of the Model Penal Code was divided.[94] Second, indirect control over the maximum term was given to the courts by empowering them to enter convictions to lesser degrees of crime than that for which offenders were tried.[95] That is, courts were given the power to indirectly impose a lower maximum sentence by reducing the degree of of-

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87 M.P.C. § 7.08 (P.O.D.).

88 M.P.C. §§ 6.06, 6.07, Comment at 24-26 (Tent. Draft No. 2); M.S.A. §§ 5, 9, Comment at 17-20, 22-29. *See also* ABA STANDARDS, *supra* note 2, at 118-120.

89 M.S.A. § 5 dealing with dangerous offenders provides: "[T]he court may sentence a defendant convicted of a felony to a term of commitment of thirty years, or to a lesser term. . . ." M.S.A. § 9 which deals with sentencing ordinary offenders provides the court may "commit the defendant to the custody of [director of correction] for a term of five years or a lesser term, or to a local correctional facility for a term of one year or a lesser term."

90 M.S.A. § 5, Comment at 18.

91 Turnblach, *A Critique of the Model Penal Code Sentencing Proposals*, 23 LAW & CONTEMP. PROB. 544, 546 (1958).

92 *Id.*

93 M.P.C. §§ 6.06, 6.07, Comment at 24-26 (Tent. Draft No. 2).

94 ABA STANDARDS, *supra* note 2, at 133.

95 M.P.C. § 6.12 (P.O.D.).

fense and by sentencing according to that reduced degree of crime. A third factor which shows that the Code is hedging in its position against judicial discretion is the provision authorizing the court to set the minimum and maximum of the extended term sentences.[96]

Concern over judicially controlled maximum sentences seems to be directed mainly at providing the courts with alternatives to imposing sentences which would be unduly harsh under certain circumstances. There is a price to pay in granting the court discretion in this area. Institutionalized plea bargaining may be one result.[97] Another consequence may be the increase or at least continuance of sentencing disparities. Sentence disparity, a problem which pervades the existing criminal justice system, is one of the main reasons behind the call for criminal code revisions.[98] One way of attacking this problem has been to reduce the variety of sentences available to a judge.[99] It does not follow, though, that all discretion as to terms of imprisonment should be eliminated. Rather, variations should be retained only when the objectives to be achieved by this discretion offset the damage from resultant sentence disparities. The need for judicial discretion to avoid unduly harsh situations should be reexamined in light of the recommendation for structuring the sentence determination process to the usual rather than unusual case. If the maximum terms authorized are substantially lower than those suggested by the Model Penal Code or the Ohio proposals, unduly harsh situations will arise much less frequently; and the need for judicial intervention may no longer exist.

The Ohio proposals concerning the maximum and minimum sentence resemble the basic structure of the Model Penal Code. The Proposed Ohio Criminal Code requires both a minimum and a maximum term to be imposed.[100] Unlike the present Ohio law which provides for no flexibility in the minimum or maximum, the court is given discretion within a limited range to establish the minimum; however, the maximum is not variable.[101] The court is given some discretion over the maximum term in an indirect manner by being authorized to impose a sentence according to the degree of offense next below that for which the offender is convicted.[102]

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[96] *Id.*

[97] The cost of granting the court the power to set a lower maximum sentence may be great as this provision will legalize and institutionalize plea bargaining. Whether the cost outweighs the benefit involves the hotly disputed matter of how beneficial or detrimental plea bargaining is. The MODEL PENAL CODE suggests that covert plea bargaining exists and cannot be done away with, therefore a provision granting the court the power to bargain will at least have the benefit of opening this process for examination. M.P.C. § 6.11, Comment at 28-29 (Tent. Draft No. 2).

[98] *E.g.*, M.S.A. § 1, Comment at 12; TASK FORCE REPORT: THE COURTS, *supra* note 2, at 23-24.

[99] ABA STANDARDS, *supra* note 2, at 134.

[100] PROP. OHIO CRIM. CODE § 2929.04.

[101] *Id.*

[102] PROP. OHIO CRIM. CODE § 2929.05(D).

Substantial differences do exist between the Model Penal Code and the Ohio proposals. The most important ones have already been severely critized in relation to their effect on the length of sentences. The practical considerations which were referred to earlier in support of a judicially controlled minimum term cannot be used to support the range of terms adopted by the Ohio proposals. The resulting increase in sentences in most cases is too severe for the results desired. If, however, the minimum terms in the Ohio proposals were reduced substantially to correspond to the suggestion of the Model Penal Code or lower, the resulting judicial discretion would be beneficial. Nevertheless, there should be an explicit authorization to the correctional agencies for correcting or reexamining any initially imposed minimum.[103] The Proposed Code's individualism of sentences in terms of providing for the more recalcitrant offenders differs substantially from the Model Penal Code. The Penal Code provides for two sets of minimum and maximum terms: one to deal with "ordinary" offenders and one dealing with "dangerous" offenders. Thus, before an extremely harsh sentence may be imposed, a separate determination must be made that this sort of sentence is appropriate. The Ohio provisions set only one maximum for each class of offense and give criteria which merely suggest that the court consider individual characteristics rather than demand a consideration as the Model Penal Code does.[104] It is submitted that maximum terms should be substantially lowered and directed more toward the usual case. Instead of authorizing a sentence of two to 20 years for arson as does the existing Ohio law,[105] or from five to ten years minimum and 25 years maximum as the new Ohio proposals,[106] a maximum of five or ten years of imprisonment should be sufficient to protect society from the ordinary offender. The result of implementation of this suggestion would be a decrease in the need to provide for judicial intervention. The special provisions designed to take care of the more dangerous offender would authorize much longer periods of imprisonment and, because of this, the need for guarding against unduly harsh situations would increase. Therefore, it is submitted that authorizing the court to set a maximum term within the statutory range when dealing with the hard-core offender would provide an adequate safeguard without substantial increase in the opportunity for sentence disparity.

B. *Probation*

Thus far, most of the discussion of sanctions in relation to sentence determination has been directed at imprisonment. There are other sanc-

[103] A provision similar to that suggested by the M.P.C. § 7.08 (P.O.D.) would adequately provide such a safeguard.

[104] PROP. OHIO CRIM. CODE §§ 2929.04, 2929.05.

[105] OHIO REV. CODE ANN. § 2907.02 (Page 1954).

[106] PROP. OHIO CRIM. CODE §§ 2909.02, 2929.04(B)(1).

tions which can be used in conjunction with or in the alternative to imprisonment and which more effectively achieve the goals of the criminal justice system. One of these alternatives, probation, is used most often as a substitute for imprisonment. The purpose of probation is to avoid unnecessary institutional commitment while achieving the goals of the criminal law. Probation offers many advantages over imprisonment as a tool to effectuate those goals. Thus, "[i]ts central advantages are that it facilitates the reintegration of the offender into the community, avoids the negative aspects of imprisonment, and reduces the financial burden on the State."[107]

Despite these recognized advantages, probation has not been utilized as effectively as it might be. Part of the reason for this phenomena is that many courts still view probation in its historical context as "an act of grace and clemency to be granted in a proper case."[108] Viewed in this way, probation becomes an alternative to be used only in the most extreme cases where the court's sympathy is aroused. Another reason that probation has not been more utilized is that legislatures have often restricted the courts' power to grant probation. One of the most common ways to limit probation is to state that certain types of offenses are non-probational.[109] This type of restriction is based upon the erroneous assumption that all offenders who commit a certain type of offense are dangerous and likely to threaten the public again. In light of the advantages offered by probation, these restrictions should be lifted and probation should be encouraged.[110]

Both legislative recommendations recognize the advantages of the increased utilization of probation and suggest methods to insure its use.[111] The Model Penal Code would permit probation for any crime except murder.[112] Similarly, the Model Sentencing Act would show a preference for non-institutional sentences by providing that "other [nondangerous] offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender. . . ."[113] Hence, the courts would be empowered under the Act to grant probation for all offenses except murder.[114] Both recommendations also provide for criteria to guide the courts in their decision to grant probation. The Model Penal Code

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107 TASK FORCE REPORT: THE COURTS, *supra* note 2, at 17.

108 *Ex parte* Trombley, 31 Cal. 2d 801, 193 P.2d 734, 741 (1948).

109 Mandatory sentences are disfavored by most authorities today. However, the existence of such provisions is wide spread. *See* references cited *supra* note 86.

110 U.S. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT No. 9, REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE 173.

111 M.P.C. §§ 6.01, 7.01 (P.O.D.); M.S.A. §§ 1, 9.

112 M.P.C. § 6.02 (P.O.D.).

113 M.S.A. § 1.

114 M.S.A. §§ 7-9.

provides express statutory criteria demanding that the courts consider probation as an alternative to imprisonment.[115] The Model Sentencing Act does not provide this express statutory criteria, but such guidelines do exist in the Act because the sentencing system is based on the individual offender. Thus, the criteria expressed by the Model Penal Code are inherent in the method for making the sentencing decision under the Act.[116]

The Ohio proposals follow the lead of the Model Sentencing Act and the Model Penal Code by altering existing laws to provide for greater and more uniform use of probation.[117] The major change proposed in Ohio law is that many nonprobational offenses are eliminated so that only two offenses will be nonprobational under the proposals.[118] In addition, the Ohio proposals attack the existing disparity in granting probation by establishing criteria to assist judges in determining whether or not to grant probation.[119] However, unlike the Model Penal Code and the Model Sentencing Act, the Ohio proposals do not encourage the use of probation. The Proposed Ohio Criminal Code does not have language similar to that of the Model Penal Code or the Model Sentencing Act which shows a preference for non-institutional sentences. Thus, the Ohio proposals, while attacking some of the problems in the present probation system, ignore the broader importance of probation as a preferable alternative to imprisonment.

IV. PRESENTENCE REPORT

The concept of a presentence report is not a new one,[120] but only recently has its potential been recognized. In the sentencing area, the best way to provide the court with the information that it needs in a sentencing decision is to require investigations and reports. Indeed, in a sentencing system like the Proposed Code's which allows for a large amount of judicial

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115 M.P.C. § 7.01 (P.O.D.).

116 *Compare* M.P.C. § 7.01 (P.O.D.), *with* M.S.A. §§ 5, 9.

117 PROP. OHIO CRIM. CODE §§ 2929.10, 2951.02.

118 OHIO REV. CODE ANN. § 2951.04 (Page Supp. 1970) provides:

> No person convicted of murder, arson, burglary of an inhabited dwelling house, incest, sodomy, rape with consent, aassault with intent to rape, or administering poison shall be placed on probation.

PROP. OHIO CRIM. CODE § 2951.02(E) states that murder and capital murder are nonprobational offenses and also that repeat or dangerous offenders are nonprobational. These are the only two nonprobational offenses under the proposals. However, other crimes outside the scope of the Proposals may remain nonprobational. For certain drug offenses which are nonprobational, see OHIO REV. CODE ANN. § 3719 (Page 1954).

119 PROP. OHIO CRIM. CODE § 2951.02.

120 TASK FORCE REPORT: THE COURTS, *supra* note 2, at 19 states:

> The importance of adequate presentence investigation has long been recognized. The National Commission Law Observance and Enforcement and many of the State crime commissions chartered in the 1920's recommended increased use of presentence reports.

(Citation omitted).

discretion, a presentence report may help insure that the sentencing decision will be rational. Moreover, most commentators would agree with the Model Penal Code's assertion that "[t]he use and full development of this device appear to us to offer greatest hope for the improvement of judicial sentencing."[121]

Both the Model Penal Code and the Model Sentencing Act recognize the advantages of the presentence report and provide for its use in the sentence determination process.[122] These provisions require a presentence investigation before *any* sentence can be imposed.[123] However, they are qualified by limiting the requirement to the more serious cases due to the lack of adequate facilities and personnel.[124] Although there are some slight differences, both major legislative recommendations seem to agree on the type of cases where a report is essential and also on the content of the report.[125] The Model Sentencing Act limits the requirement of a presentence report to crimes involving moral turpitude and crimes for which a commitment for a year or more may be imposed.[126] In addition, it appears that the requirement would be extended to include all juvenile offenders.[127] The Model Penal Code requires a presentence report when the defendant is convicted of a felony, when the defendant is convicted of any crime and is less than 22 years of age, or when the extended term provisions will be used in sentencing.

Although most authorities in the criminal law field generally agree on the mandatory requirement of a presentence report in the more serious cases, they have not, however, been able to agree on the issue of who should be able to examine these reports.[128] Of course, the court and generally parole officials would have access the report. The major debate on the access of presentence reports has centered around the availability of the report to the parties or their attorneys. Three basic positions have been taken by the commentators. The first places disclosure entirely within the discretion of the court. Ohio presently takes this position and will continue it after the proposals are adopted.[129] Arguments asserted in favor of this position are that (1) disclosure of sources of information

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121 M.P.C. § 7.07, Comment at 53 (Tent. Draft No. 2).

122 *See* M.P.C. § 7.07 (P.O.D.); M.S.A. § 2.

123 *Id.*

124 M.P.C. § 7.07, Comment at 52-55 (Tent. Draft No. 2); M.S.A. § 2, Comment at 15.

125 *Compare* M.P.C. § 7.07 (P.O.D.), *with* M.S.A. §§ 2, 3.

126 M.S.A. § 2.

127 M.S.A. § 14.

128 For a summary of the different positions taken, see ABA STANDARDS, *supra* note 2, at 214.

129 OHIO REV. CODE ANN. § 2947.06 (Page Supp. 1970). *See also* OHIO REV. CODE ANN. § 2951.03 (Page Supp. 1970).

would cause these sources to dry up;[130] (2) disclosure would result in controversies over portions of the report and thus delay the court in imposing sentence;[131] (3) the investigators can be trusted to insure the accuracy of the report.[132] The second, and opposite, approach would permit the defendant knowledge of the contents of the report and the sources of its information. Arguments in support of this position stress that fundamental fairness requires that the defendant know and be able to challenge any information which may determine how long he may lose his freedom. The third approach taken on this issue of disclosure is a compromise which both the Model Penal Code and the Model Sentencing Act adopt.[133] The Model Sentencing Act grants the court the discretion to make the report in whole or in part available to the "ordinary" defendant.[134] When the court is dealing with the "dangerous" offender, the presentence report *must* be made avaliable to the defendant with a limited right to cross-examine the sources of the information.[135] The Model Penal Code would sanction more complete disclosure by requiring that the contents and conclusions of the report be disclosed to the defendant although the sources of the information need not be disclosed.[136] Whether or not the sources are disclosed, the offender is to be given a fair opportunity to controvert the facts.[137]

There is a notable absence of any provision dealing with presentence reports in the Ohio proposals. The Proposed Code clearly anticipates some fact-gathering procedure to aid in sentencing. Some of the factors that the court is to consider when imposing sentence are that the offender "has led a law-abiding life for a substantial time before commission of the present offense"[138] and that "[t]he offender is likely to respond quickly to correctional or rehabilitative treatment."[139] Of course, the court can consider "the history, character, and condition of the offender."[140] The first ver-

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130 Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 180.

131 ABA STANDARDS, *supra* note 2, at 217.

132 Hincks, *In Opposition to Rule 34(c)(2), Proposed Federal Rules of Criminal Procedure*, 8 FED. PROB. 3, 7 (Oct.-Dec., 1944).

133 M.P.C. § 7.07(5) (P.O.D.); M.S.A. § 4.

134 M.S.A. § 4.

135 M.S.A. § 4, Comment at 15.

> [W]hen the defendant is a dangerous offender, the length of the commitment and the character of the findings required before sentence may be imposed are such that due process requirements suggest additional safeguards for the defendant.

136 M.P.C. § 7.07(5) (P.O.D.).

137 *Id.*

138 PROP. OHIO CRIM. CODE § 2929.05(c)(6). *See also* PROP. OHIO CRIM. CODE § 2929.07(c).

139 PROP. OHIO CRIM. CODE § 2929.05(c)(7). *See also* PROP. OHIO CRIM. CODE § 2929.07(c).

140 PROP. OHIO CRIM. CODE §§ 2929.05(A), 2929.07(A).

sion of the Proposed Code did provide for a presentence report in all felony cases.[141] That proposal was quite similar to the Model Penal Code's provision in that the factual contents and conclusions of the report were to be disclosed to the defendant.[142] There was, however, no reference to disclosure of the sources of the information. Unfortunately, this provision was not included in the amended version of the Proposed Ohio Criminal Code.

Existing Ohio law provides the court with the opportunity to obtain a presentence report.[143] A report is never mandatory; therefore, its use is entirely within the discretion of the court.[144] No disclosure of the report is required nor is there any opportunity to controvert the facts or conclusions,[145] except in the case of a psychologist's report.[146] One other provision of the existing code deals with presentence reports in a limited context.[147] This section requires an investigation only if the offender is to be released on probation. The potential probationer also has no right to examine the fact on which his freedom may depend.

Before the presentence report can "offer the greatest hope for the im-

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141 The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 50-6-5(A).

142 *Id.* No. 50-1-5(D).

143 OHIO REV. CODE ANN. § 2947.06 (Page Supp. 1970) provides:

> The trial court may hear testimony of mitigation of a sentence at the term of conviction or plea, or at the next term. The prosecuting attorney may offer testimony on behalf of the state, to give the court a true understanding of the case. The court shall determine whether sentence ought immediately to be imposed or the defendant placed on probation. The court of its own motion may direct the department of probation of the country wherein the defendant resides, or its own regular probation officer, to make such inquiries and reports as the court requires concerning the defendant, and such reports shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders.
>
> The court may appoint not more than two psychologists or psychiatrists who shall make such reports concerning the defendant as the court requires for the propose of determining the disposition of the case. Each such psychologist or psychiatrist shall receive a fee to be fixed by the court and taxed in the costs of the case. Such reports shall be made in writing, in open court, in the presence of the defendant, except in misdemeanor cases in which sentence may be pronounced in the absence of the defendant. A copy of each such report of a psychologist or psychiatrist may be furnished to the defendant, if present, who may examine the persons making the same, under oath, as to any matter or thing contained therein.

144 OHIO REV. CODE ANN. § 2947.06 (Page Supp. 1970).

145 *Id.*

146 *Id.*

147 OHIO REV. CODE ANN. § 2951.03 (Page Supp. 1970). The statute in part provides:

> No person who has pleaded guilty of or has been convicted of a felony shall be placed on probation until a written report of investigation by a probation officer has been considered by the court. The probation officer shall inquire into the circumstances of the offense, criminal record, social history, and present condition of the defendant. Such written report of investigation by the probation officer shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders . . . .

provement of judicial sentencing,"[148] substantial changes in the present and proposed law will have to be made. To insure use of the presentence report, it must be a statutory requisite to sentencing, at least in the more serious cases. Indeed, in a sentencing system such as that contained within the proposed code, a presentence report is a necessity for an informed and just sentencing decision. The lack of a presentence report in the Proposed Code will lead to serious inequities in the sentencing patterns in Ohio. The present Ohio provision requiring presentence report for probation is an insufficient use of the device. Neither the defendant or society is served by an unnecessary sentence that is caused by a lack of information about the offender. Such irrationality in sentencing is a poor use of judicial and correctional resources. A presentence report should be required in at least the serious felonies in the Proposed Code. But even if a presentence report system is developed and used, the question of disclosure will eventually be confronted. The arguments in support of nondisclosure are each "aimed at a specific evil which may indeed be a legitimate cause for concern, but yet is generally asserted as supporting nondisclosure in all cases irrespective of the existence of even a remote possibility in a particular case of the actual occurrence of the feared result."[149] It would be much more rational to disclose the information in the reports unless some compelling reason can be shown in favor of nondisclosure. In this way the offender can protect himself from mistakes or false information in the majority of cases. The President's Commission has stated that "in the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report."[150] It was mentioned in the Introduction that the sentence determination process has very few safeguards in terms of protecting the offender. A provision similar to the one suggested by the President's Commission and requiring the court to state reasons for any nondisclosure would be one way of putting some safeguards into this process without much cost.

James Kapel

148 M.P.C. § 7.07, Comment 52-55 (Tent. Draft No. 2).

149 ABA STANDARDS, *supra* note 2, at 218.

150 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 145 (1967).

APPENDIX I

Sanctions Authorized by the Model Penal Code

CLASS OF OFFENSE	ORDINARY TERM		EXTENDED TERM	
	MINIMUM	MAXIMUM	MINIMUM	MAXIMUM
FIRST DEGREE FELONY*	Imprisonment for 1,2,3,4, 5,6,7,8,9, or 10 years and/ or fine of up to $10,000.	Life imprisonment** and/ or fine of up to $10,000.	Imprisonment for not less than 5 years nor more than 10 years.	Life Imprisonment.
SECOND DEGREE FELONY	Imprisonment for 1,2, or 3 years and/ or fine of up to $10,000.	Imprisonment for 10 years and/or fine of up to $10,000.	Imprisonment for not less than 1 nor more than 5 years.	Imprisonment for not less than 10 years nor more than 20 years.
THIRD DEGREE FELONY	Imprisonment for 1 or 2 years and/or fine of up to $5,000.	Imprisonment for 5 years and/or fine of up to $5,000.	Imprisonment for not less than 1 year nor more than 3 years.	Imprisonment for not less than 5 years nor more than 10 years.
MISDEMEANOR		Imprisonment for not more than 1 year and/or a fine of up to $1,000.	Imprisonment for not more than 1 year.	Imprisonment for not more than 3 years.
PETTY MISDEMEANOR		Imprisonment for not more than 30 days and/or a fine of up to $500.	Imprisonment for not more than 6 months.	Imprisonment for not more than 2 years.
VIOLATION	No penalty except a fine.			

* Murder, although classified as a first degree felony, may be penalized by death under § 210.6 of the Model Penal Code.

** Fines are authorized for all offenses under § 6.03 of the Model Penal Code and may be used under § 6.02 in conjunction with imprisonment.

APPENDIX II

Sanctions Authorized by the Proposed Ohio Criminal Code

CLASS OF OFFENSE	MINIMUM	MAXIMUM
CAPITAL MURDER	Imprisonment for 20 years	Death or Imprisonment for life
MURDER	Imprisonment for 15 years	Life Imprisonment
FIRST DEGREE FELONY	Imprisonment for 5, 6, 7, 8, 9 or 10 years	Imprisonment for 25 years
SECOND DEGREE FELONY	Imprisonment for 3, 4, 5, or 6 years	Imprisonment for 15 years
THIRD DEGREE FELONY	Imprisonment for 2, 3, or 4 years	Imprisonment for 10 years
FOURTH DEGREE FELONY	Imprisonment for 1 or 2 years	Imprisonment for 5 years
FIRST DEGREE MISDEMEANOR*		Imprisonment for 6 months and/or $1,000 fine
SECOND DEGREE MISDEMEANOR		Imprisonment for 90 days and/or $750 fine
THIRD DEGREE MISDEMEANOR		Imprisonment for 60 days and/or $500 fine
FOURTH DEGREE MISDEMEANOR		Imprisonment for 30 days and/or $250 fine
MINOR MISDEMEANOR		$100 fine

* In contrast to the Capital Murder, Murder and Felony classifications, the Misdemeanor classifications have definite rather than indefinite sentencing structure. Also, the Misdemeanor classifications provide for fines in addition to, or in the alternative to imprisonment.